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Infrared Breath - Test Operator's

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Recertification Manual

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A faint, grayscale background image of a classical building, possibly a temple or a large library, featuring a series of columns supporting an entablature and a pediment. The building is rendered with a soft, out-of-focus effect.

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1993 INFRARED BREATH TEST RECERTIFICATION MANUAL

I. INTRODUCTION

Operating under the influence of alcohol has been a serious problem on our roads and highways since the invention of the automobile. To help combat the problem of drinking and driving, the SAFE ROADS ACT, Act 620 of 1986 was passed by the Massachusetts legislature. The Safe Roads Act created a new structure of fines and punishments for operating under the influence of alcohol. The Safe Roads Act also created the Office of Alcohol Testing within the Department of State Police.

The Office of Alcohol Testing certifies all infrared breath testing instruments and all simulators in the Commonwealth on an annual basis. The Office of Alcohol Testing (OAT) provides solution for the calibration standard analyses portion of each defendant's test and all solutions for periodic testing and annual certification testing of the instruments and simulators.

There are approximately 10,000 certified breath test operators in the Commonwealth. There are over 450 certified infrared breath testing instruments in Massachusetts. There are approximately 50 certified breath test operator instructors who teach new operators about breath testing instruments. There are over 150 recertification instructors who update operators on changes in the law, the program and the instruments being used. Recertification instructors can recertify valid breath test operators for a period of three years.

From 1987 to 1993, approximately eight to ten thousand individuals have taken infrared breath tests each year to determine their blood alcohol level. The average BAC (blood alcohol content) of the individuals taking the test has averaged 0.17% annually. There were 552 traffic fatalities in 1991. 173 involved a driver at 0.10% or above, 31.3%. (NOTE: Speed is our number one killer).

By becoming recertified as an infrared breath test operator, you will be able to administer breath tests on any certified infrared breath testing instrument in the Commonwealth in accordance with promulgated regulations. The test results you obtain as a certified operator will be used to suspend licenses or the right to operate in the Commonwealth. The test results may also be used in criminal proceedings resulting from the arrest. A breath test operator is recertified for a period of three years after successful completion of the recertification course.

The goal of recertification is to keep the breath test operator current on changes in the law, the instrument and the breath testing community. This manual serves to highlight some of the more important changes in these areas for the breath test operator.

II. RECENT COURT DECISIONS

A. PERIODIC TESTING

As a result of the Safe Roads Act of 1986 the Office of Alcohol Testing was created through the promulgation of Mass. Regs. Code tit. 501 s.2.00 (1987). OAT implement numerous mandates with an effective

date of July 1, 1987 to comply with the promulgated regulations. Among these mandates was a periodic testing program.

All "Officers in charge" of breath testing equipment in each police agency were instructed in June of 1987 at OAT as to what was required of them as a result of these new regulations. Among other requirements, each officer in charge was instructed by the Director of the Office of Alcohol Testing about the periodic testing of the instruments and simulators. Each officer in charge was given a Maintenance and Use Log. Each log contained: a) Maintenance and Use Log Guidelines; b) Rules for Storage, Handling and Replacement of Simulator Solution; c) Breath Test Log; d) Maintenance and Repair Log; and e) Calibration Log.

All officers in charge were instructed in how to keep this log, including their responsibility to periodically test the instrument and simulator and keep records of the test results. The periodic testing began in July of 1987 and was done in accordance with written guidelines found in the Maintenance and Use Log.

Each time the instrument and simulator were brought to the Office of Alcohol Testing for certification, not only was the equipment checked, but the logs were also checked for compliance with the periodic testing program. If the department was in compliance with the periodic testing program and the instrument and simulator were recertifiable, a certificate would be issued. The certificate would remain valid for one year provided that the department continued to comply with the periodic testing program. Compliance with the program has always been documented through examining a department's

logs. If all calibration records were present indicating the officer changed the solution in compliance with the rules for storage, handling and replacement of the solution and all results were within +/- 0.01% of 0.15%, the department would be in continued compliance with the regulations.

Periodic testing was raised only once as an issue at which the Director of OAT testified in Pittsfield District Court in the case of Commonwealth v. Hayes. The judge ruled that there was periodic testing and the instrument in question was in compliance with the periodic testing program. Over 52,000 breath tests had been given during this time period.

As a result of the holding in Commonwealth v. Barbeau, 411 Mass. 782 (1992), the Commonwealth must establish the existence of and compliance with a periodic testing program under Mass. Gen. L. ch. 90, s 24K (1986), and the regulations adopted by the Secretary of Public Safety, Mass. Regs. Code tit. 501, s 2.00 (1987).

On February 13, 1992 the Office of Alcohol Testing promulgated emergency regulations which served to codify the periodic testing program that was in place. Within ninety days, the regulations will become permanent. The effective date will remain Feb. 13, 1992. The amended 501 C.M.R. 2.41 was published in the February 28, 1992 **Massachusetts Register**.

The "new" regulations are just the same program that has been in place since July 1, 1987. The only new component to the program is the issuance of certificates of compliance on a semiannual basis. The Office of Alcohol Testing has assigned departments two months

annually, at six month intervals, in which their records will be reviewed and a certificate of compliance will be issued. Ex. January and July; or February and August.) A copy of a compliance with periodic testing certification is found in the addendum to this manual. All periodic testing certificates are good for a period of six months. It is imperative that all breath test operators are aware that the periodic testing certificate is now needed in addition to the instrument and simulator's certificate as of January 1, 1993 by regulation. 501 CMR 2.41(7) (1992).

The instruments and simulators do not have to be tested on a semiannual basis. Each time the instrument is used, you are testing the instrument and simulator with the known alcohol solution. Each time the calibration tests are run you are again periodically testing the instrument and simulator. Only if results obtained on the simulator solutions when changed are not 0.14%, 0.15%, 0.16% must the instrument and/or simulator then be recertified. This does not mean because the operator made an error and didn't wait for the simulator to warm up and obtained a 0.12%, the instrument and/or simulator must be recertified. Any operator error does not require recertification of an instrument. Any instrument error that effects calibration requires recertification of the instrument. Any simulator error requires recertification of the simulator.

Several written MEMORANDUM OF DECISIONS have been issued on periodic testing by Justice Peter W. Agnes, Jr. the Presiding Justice in Chelsea District Court. Commonwealth v. Redmond, Jury Session at Lowell District Court, Docket No. 9111-1127, March 2, 1992 outlines

what is acceptable proof of the periodic testing program and sets forth the foundation the Commonwealth must establish to be in compliance with the Barbeau decision. All testimony was given by the officer in charge.

Comm. v. Walsh , Charlestown District Court, Docket No. 9204 cr 0128, April 27, 1992, also issued by Justice Agnes uses the breath test operator and the officer in charge to establish compliance with the periodic testing program.

The Director of OAT testified in the case of Commonwealth v. Smith, Suffolk Superior Court, Indictment Nos. 095993-8, March 2, 1992, Justice Robert Banks ruled that there is a periodic testing program, has been a periodic testing program since 1987 and in this particular case that the Boston Police Department was in compliance with the periodic testing program.

On June 16, 1992 the Supreme Judicial Court held in Morris v. Comm., that the periodic testing programed as codified in 501 CMR 2.41 meets the legislative goals of insuring accurate breathalyzer readings. At issue was the delegation of authority to test the instruments. It was argued that OAT should run each calibration test. The SJC said OAT properly delegated to the police "only [the] purely ministerial duty of conducting the calibration standard analyses, a duty which involves no exercise or discretion of judgment."

A new challenge is on its way to the SJC , Comm. v. McNeil. The breath test in question was administered in October of 1991, prior to the codification of the periodic testing program. The defendant is claiming that an ex post facto law is being applied which is

constitutionally impermissible. Arguments on this case should be heard before the summer recess of the court.

When the periodic testing regulations were codified on February 10, 1992, they created three time periods. The first time period was all cases before February 13, 1992. In these cases, the periodic testing program was found in the Maintenance and Use Log Guidelines, which each officer in charge in the Commonwealth had and was following. By reviewing the breath test and calibration logs, compliance with the periodic testing program could be documented.

The next time period created was cases from February 13, 1992 to December 31, 1992. Compliance with the codified periodic testing program could be shown by review of department's logs, 501 CMR 2.41(7). (1992).

The third time period created was January 1, 1993 and beyond. Any tests given in this time period can show compliance with periodic testing by a certificate, valid for six months, from the Director of the Office of Alcohol Testing. 501 CMR 2.41(6) (1992).

B. NONCERTIFIED BREATH TEST OPERATORS

An OUI case was tried in Middlesex County six man jury at which the Commonwealth could not offer proof of certification of the breath test operator. The operator was validly certified, but could not produce his current certificate, only one which had expired. The trial court allowed the breath test result into evidence. The defendant appealed. In Commonwealth v. Tierney the Mass. Appeals Court reversed the trial courts decision. The court said handling

scientific equipment requires a minimum level of competency and the statute and regulations are clear that an operator must be certified. The Commonwealth bears the burden of proving certification of the the breath test operator.

C. EXPIRED SIMULATOR SOLUTION

An OUI case, Comm. v. Still, was tried in Charlestown District Court in which expired simulator solution was used for the calibration analysis portion of the defendant's breath test. The solution read a 0.15%. The defendant claimed that under Commonwealth v. Cochran, 25 Mass. App. Ct. 263 (1988), the breath test is invalid because the simulator solution is expired. The court held that unlike Cochran, the simulator test in this case was within the acceptable deviation permitted by regulation. There is also authority to admit testing procedures that are "adequate" though not "ideal". Commonwealth v. Yameen, 401 Mass. 331, 336 (1987), cert. den. 486 U.S. 1008. The trial court ruled the test result was admissible in Comm v. Still.

D. FIELD SOBRIETY TESTS

There has been confusion as to whether an officer can ask a defendant to recite the alphabet as a roadside field sobriety test. Whenever a defendant is asked to respond to an impress or implied assertion of fact or belief, the defendant can respond correctly, incorrectly or not answer. This response would be testimonial.

Pennsylvania v. Muniz, U.S. , 110 S. Ct. 2638, 2648, 110 L.Ed.

2d 528 (1990). (where police compelled defendant to calculate the date of his sixth birthday, his inability to do so was testimonial in nature). "Future challenge, then, should focus on the nature of the alleged custodial circumstances, and, if raised, on whether police field inquiries impermissibly reveal the defendant's thought process." Commonwealth v. Ayre, 31 Mass. App. Ct. 17, 21, 574 N.E.2d 415, 418 (1991). (quoting Muniz, 110 S. Ct. at 2642, 2645-2649).

The defendant was asked to recite the alphabet, count numbers and respond to questions regarding alcohol consumption in Ayre as roadside field sobriety tests. The court held that these tests were not considered custodial in nature, even though the defendant was not free to leave.

If you have been trained and certified in performing the NHTSA Standardized Field Sobriety Tests, continue to use them. If your field sobriety tests are a result of other training and experience, do not ask any questions involving the defendant's thought process.

E. CONSEQUENCES OF FAILING A BREATH TEST

Police are under no statutory or regulatory obligation to advise an individual of the sanctions involved when failing a breath test. Commonwealth v. Crowell, 403 Mass. 381, 288, 529 N.E.2d 1339 (1988). Commonwealth v. Madden, 28 Mass. App. Ct. 975, 976, 522 N.E.2d 364 (1990). Defendant argues in Commonwealth v. Lively, 30 Mass. App. Ct. 1022, 1025 (1991) that he was not advised as to the resulting sanctions of a breath test result of 0.10% or above, in accordance with provisions of 501 C.M.R. 2.55 (1987). The Office of Alcohol

Testing removed the provision in 501 C.M.R. 2.55 requiring an officer to tell of the sanctions if the test result was 0.10% or higher in March of 1991 to make the regulations consistent with case law.

F. ADEQUATE NOTICE OF M.G.L. c. 263 s 5A

At the time the defendant was booked he was shown a copy of G.L. c.263 s 5A and given an opportunity to read the statute. He was told of the statutes importance, but seemed disinterested. The statute was read to him word for word by the police. No copy of the statute was given to the defendant and none was posted in the station. The court held in Commonwealth v. Gruska, 30 Mass. App. Ct. 940, 570 N.E.2d 164 (1991) even though the police did not comply with G.L. c. 263 s 5A, they did not attempt to avoid or subvert the policy behind the statute. They said the defendant was adequately notified of his right to an independent physical examination.

G. INDEPENDENT BLOOD TESTS

A defendant has the right to an independent physical examination in accordance with G.L. c. 263 s 5A. During this examination, the defendant can, at his direction, have an independent test of his blood for the alcohol level. Mr. Rosewarne was charge with operating under the influence of alcohol. When informed of his right to an independent examination by a physician of his choosing, he telephone the hospital to arrange for a blood test. The hospital agreed to the test at the hospital, not the barracks. The police refused to transport him to hospital. The court states " We transferred the case

to this court on our own motion. We again hold that police have no obligation under G.L. c. 263 s. 5A to transport a defendant to a doctor, hospital, or clinic to obtain an independent examination." Commonwealth v. Rosewarne, 410 Mass. 53, 54, 571 N.E.2d 354, 355 (1991).

Also, if a defendant takes and completes an evidentiary breath test, they must be told of their right to a comparison blood test. The defendant must be advised that the results of the blood test can be used at time of arraignment to restore their license. This right is independent of G.L. c. 263 s. 5A, and only is applicable if the evidentiary breath test is completed.

H. SERUM ALCOHOL AND HOSPITAL RECORD

If a person is injured in a motor vehicle accident and transported to the hospital for treatment, many department do not arrest the injured person when probable cause exists for OUI, but instead summons them to face charges. As a result no blood alcohol tests are done to determine the person's BAC. Most departments obtain the hospital records of the defendant pursuant to M.G.L. ch 233, sec. 79. A serum alcohol test is normally done routinely for diagnosis and treatment of the defendant.

Serum alcohol is always higher than blood alcohol. Serum alcohols are approximately 10% higher than blood alcohols. Because serum alcohol can be converted to blood alcohol by a simple mathematical formula, a Serum Conversion Chart has been prepared by OAT. It is found in the addendum in this manual. This chart has

received not only acceptance in the courts, but also acceptance in the medical community. It has been requested by various private physicians and hospitals throughout New England.

In Comm. v. Russo, 30 Mass. App. Ct. 923, 567 N.E.2d 1255 (1991), the defendant argued against the admission of his hospital record, which indicated a high BAC level, as a violation of his fourth amendment rights. The defendant also argued that the prosecution did not establish that the blood was drawn and tested for diagnosis and treatment; and that no chain of custody was established by the Commonwealth.

The court indicated it had held in Comm. v. Sargeant, 24 Mass. App. Ct 698, 497 N.E.2d 651 (1986) that there need be no showing that blood tests were related to specific treatment or diagnostic inquiry if there was evidence that blood tests are standard procedure in the hospital for the sort of medical problem presented. As to the chain of custody issue the court indicated that it had previously ruled that hospitals routinely rely on these records to treat patients, and no hospital personnel are needed to confirm this professional routine. Bouchie v. Murray, 376 Mass. 524, 527-28, 381 N.E.2d 1295 (1978).

The Russo case also held that a chemist from the Department of Public Safety Crime Lab was qualified as an expert witness to interpret hospital records and convert the serum alcohol to blood alcohol.

The admissibility of hospital records indicating the serum ethanol level of another defendant were again at issue in Comm. v.

Dube, 413 Mass. 570 (1992). Again it was argued that testimony concerning the defendant's test results was violative of his right to confidentiality and privacy under M.G.L. ch. 233, sec. 79, ch 214 sec.1B, and ch. 111, sec 70E (1990 ed.). When taken to the hospital for medical treatment, "as a routine medical procedure" blood was drawn from the defendant. The serum was tested for ethanol, along with a battery of other tests, and recorded in the hospital record.

The court states that M.G.L. c 233, sec. 79 has long been construed to allow admission of hospital records for the purpose of showing that a criminal defendant has consumed intoxicating liquor shortly before events that led to a charge of operating a motor vehicle while under the influence of intoxicating liquor. See Comm. v. Russo, 30 Mass. App. Ct. 923 (1991); Comm. v. Sargeant, 24 Mass. App. Ct 657 (1987); Comm. v. Riley, 22 Mass. App. Ct. 698 (1986), Comm. v. Atencio, 12 Mass. App. Ct. 747 (1981).

I. EXTRA-TERRITORIAL ARREST

The statutory authority for a police officer to make an arrest outside of his jurisdiction is found in M.G.L. ch. 41, sec. 98 A. The statute enables an officer to arrest a fleeing suspect provided that the following conditions are met:

1. The officer is engaged in fresh and continued pursuit;
2. The offence was committed in the officer's presence;
3. The offence was committed in the officer's jurisdiction;
4. The offence was one for which the officer could make an arrest within his jurisdiction without a warrant*.

The statute also provides for the return of the arrestee to the

jurisdiction where the offence occurred.

Case law holds that a police officer must have "some reason to believe" that the driver of a fleeing vehicle has committed an arrestable offence in his jurisdiction to continue pursuit into neighboring jurisdictions. Comm. v. O'Hara, 30 Mass. App. Ct. 608 (1991).

NOTE Pursuant to M.G.L. ch 90, sec. 21, police officers may make arrests without warrant for the following offences: OUI; OTE; leaving the scene of a personal injury accident; failure to stop for a police officer; unauthorized use; and driving without a license.

III. RESPONSIBILITIES OF THE BREATH TEST OPERATOR

A. PREPARING THE INSTRUMENT AND SIMULATOR FOR A TEST

1. Turn instrument on and simulator on.
2. Make sure there is no mouthpiece on the end of the blow tube to inhibited the flow of room air.
3. Prepare the top of the operational procedure checklist.
4. Have a mouthpiece and test ticket ready.
5. Check to see if the simulator is at proper temperature and if the instrument is ready.
6. Check that the individual has been properly told of their opportunity to submit to a chemical test and has consented to take such a test. A standardized statutory rights and consent form is included in the addendum to this manual.

It is suggested but not mandated that you use the standardized form.

B. ADMINISTERING A BREATH TEST

1. Confirm the subject has been under observation for at least fifteen minutes.
2. Press the start test button. Follow the procedures on the proper operational procedure checklist. Allow the instrument to air blank before putting on the mouthpiece for the defendant's test.
3. Remove the defendant's mouthpiece after each defendant's test. One mouthpiece can be used for both tests.
4. Once the testing procedure is completed in accordance with the operational procedure checklist, advise the defendant to his/her right to a comparison test.
5. All valid evidentiary tests are to be placed in the Breath Test Log section of the Maintenance and Use Log.

C. VARIATIONS WHEN ADMINISTERING A BREATH TEST

1. If the defendant will only supply one breath and does not complete the breath testing sequence; fill out the refusal form. Keep the incomplete ticket and operational procedure checklist.
2. If the simulator is not 0.14%, 0.15% or 0.16%; check the simulator before retesting the subject. Check for: a) the proper temperature; b) a tight seal; c) a crack in the jar; d) a spinning propeller; or e) properly connected hose(s).

3. If the subject blows a deficient sample, allow them the opportunity to take another valid test. If the subject refuses, fill out the refusal form. Keep the incomplete test ticket and operational procedure checklist.
4. Numerous individuals with one lung have been able to complete valid tests. There is no medical exception in the G.L. for people with emphysema; only diabetics, hemophiliacs, and any other condition requiring the use of anticoagulants(blood thinning medications). Also note these medical exceptions apply only to blood tests not breath tests.
5. If a subject has a blood alcohol above a 0.20%, it is sometimes more difficult to get 0.02% agreement. This is due to variations in the individuals breath, not the machine. In these cases, count for the same number of seconds each test and stop the test at the same count each time. Remember test records are on file at OAT to indicate the repeatability and accuracy of your instrument. Also, your periodic tests of your simulator very clearly indicate the repeatability of the instrument.
6. The argument that because the simulator is 0.14%; the subject's 0.10% is a 0.09% has no scientific validity. The variation is due to the simulator. The solution can be weak from use. The simulator might not be at proper temperature. The room air being drawn across the top of the simulator may be cool, lowering the result. What has

a scientifically reliable foundation is the fact that the individual's blood alcohol as determined by his breath is approximately 9% lower than his true blood alcohol as determined by a blood sample. Remember you also report the lower of the defendant's two readings, and the instrument truncates the results.

7. If you have an air blank of anything but 0.00%, do not use the instrument.
8. If the date and/or time on the test ticket are incorrect, write the correct date and time on the ticket and initial your corrections. Notify the officer in charge that the instrument is printing the incorrect date and time. The officer in charge can make arrangements to have the battery replaced. Even if the date and time are incorrect, the instrument can still properly quantitate an individual's blood alcohol.

IV. UPDATE ON INSTRUMENTATION

A. AUTHORIZED PERSONNEL

Only individuals authorized by the Office of Alcohol Testing can repair certified infrared breath testing instruments in the Commonwealth in accordance with 501 CMR 2.54. Authorized personnel can not repair all types of instruments. They are authorized to repair only the instruments for which they have received approval

for. (Example: An Intoxilyzer 5000 technician can not repair a Smith & Wesson 2000).

Once a repair is completed, the instrument must be recertified only if the repair involved any component which would effect the quantification of alcohol. Only the Director of the Office of Alcohol Testing has the authority to certify instruments. No valid certifications are issued by any repair individuals in the Commonwealth.

B. APPROVED INSTRUMENTS

Only instruments on the Department of Transportation, National Highway Traffic Safety Administration 's "Conforming Products List" and on the Office of Alcohol Testing's list of Approved Instruments can be used to perform breath tests in the Commonwealth. The OAT list of approved instruments is found in the addendum to this manual.

C. MAINTENANCE AND USE LOGS

Each certified breath testing instrument in the Commonwealth has a Maintenance and Use Log . The log contains breath tests, maintenance and repair records, and records of periodic testing . The maintenance and use log shall be maintained for a minimum of two years. 501 CMR 2.54. Any records older than two years can be disposed of at the Officer in Charge's discretion.

D. SIMULATOR SOLUTION

Simulator solution is available at all State Police Barracks.

Solution is also available at the MCJTC reception area, the MSP Crime Lab and the Office of Alcohol Testing. It is available whenever needed. If you are having trouble obtaining solution at the barracks, please contact OAT.

E. INSTRUMENTS WITH KEYBOARDS

It is the goal of OAT to network all instruments through the CJIS system at some future date. All the questions on top of the operational procedure checklist are now asked by the software in instruments with keyboards. The Intoximeter 3000 and the Intoxilyzer 5000 already have standardized their software. All responses are printed on top of the test ticket and do not need to be written on the corresponding operational procedure checklists.

F. INTERLOCK DEVICES

The Weld administration vetoed a bill that required ignition interlock devices on three classes of OUI convictions: 1) under 21 drivers; 2) second offenders who wish to get a hardship license; and 3) anyone else the judiciary felt could benefit from such a program.

An interlock device is simply a small portable breath testing instrument wired into a vehicles ignition system. If the person blows through the PBT and passes, the interlock will not impede them from starting their vehicle. If they blow through the device and fail, they are locked out of their ignition system and can't start their vehicle by conventional methods.

The systems use technology that only has an accuracy of +/-

0.02%. The systems should be set at 0.025% to prevent a person of 0.06% or above from driving a vehicle. The technology's accuracy is subject to temperature changes; pressure changes (sea level v. Berkshire Mountains); the presence of pollution or smoke in the air; gasoline fumes; cigarette smoke; mouth washes; and an endless list of other chemicals found in our everyday environment. The technology also tends to make the sensors drift high, allowing a person with more alcohol than the set limit to start their vehicle. It has been reported in the scientific literature that a person can start his vehicle by blowing air in with a hair dryer, with a balloon, blowing through a long straw or in one instance through a 50 foot garden hose.

The administration would like to institute a pilot program through the registry to evaluate the devised effectiveness.

V. UPDATE ON STATE LAWS

A. COMMERCIAL DRIVERS LICENSE

On October 26, 1986 Congress passed the Commercial Motor Vehicle Safety Act of 1986. The law requires each state to meet minimum safety standards for commercial driver licensing. As of April 1, 1992 all commercial vehicle operators must have a CDL. As a result of this Act, the Commonwealth has passed G.L. c 90 F. If a commercial driver has a blood alcohol of 0.04% or more, they are driving under the influence of alcohol and administratively lose their license for one year. If the offense occurs while they are operating a CMV placarded for hazardous materials, they lose their CDL for three

years. A second offense for both categories is a loss of their CDL for life.

If their blood alcohol concentration is less than 0.04%, but they still have a detectable amount of alcohol, they are placed out of service for 24 hours.

This is not an arrestable offense. Questions were drafted by this office and the RMV and given to RMV's legal staff. The questions and answers are found in the addendum to this manual.

When testing a defendant for his blood alcohol level, follow the same procedures when administering a breath test. Make the defendant supply to adequate breath samples and run the simulator in the middle.

All instruments in the Commonwealth have been tested at 0.04% and are capable of properly quantitating alcohol at this level.

B. OMNIBUS TRANSPORTATION ACT OF 1991

The federal Department of Transportation passed Public Law 102-143 on October 28, 1991. This law mandates drug and alcohol testing for airlines, railroads, trucking and mass transit. Newly effected groups include city bus and rail lines, municipal school bus drivers and inter state truck drivers of rigs weighing over 26,000 lbs. This act is addition to the Commercial Motor Vehicle Safety Act.

The comment period is now (January 1993) taking place. Final rules will be published in the Federal Register in June or July of 1993. Final compliance is estimated for the summer of 1994. The Commonwealth will be forced to enact a statute and implement regulations in accordance with DOT mandates in the coming months.

C. ADMISSION OF A REFUSAL TO TAKE THE BREATH TEST

The Senate requested an advisory opinion of the Justices of the Supreme Judicial Court for the Commonwealth concerning Senate Bill No. 717. Briefs were submitted by the Secretary of Public Safety, MADD, and others on March 12, 1992. The question to be decided by the SJC is whether the admission of the defendant's failure or refusal to submit to a chemical test or analysis of his breath in a criminal proceeding is violative of the self incrimination clause of Article XII of Part the First of the Constitution of the Commonwealth in that the defendant is compelled to furnish evidence against himself. Massachusetts is one of only three states which does not permit the refusal to be admitted into evidence.

The SJC held that in the Commonwealth it is violative of the defendant's right to avoid self incrimination under the Constitution of the Commonwealth. We are still not allowed to introduce evidence of a refusal to take the breath test at trial.

C. LEGISLATIVE GOALS IN 1993

The administration has filed a comprehensive drunk driving bill which consists of increased fines, penalties and even public embarrassment to combat drunk driving. The proposals include:

1. A list to be published monthly in local newspapers, supplied by the RMV of OUI convictions in the preceding 30 days.
2. Judges could order first time offenders to operate an interlock equipped car; mandatory for under 21 drivers.

3. Repeat offenses count for ten years instead of the present six.
4. Decrease 0.10% to 0.03%. (California, Maine , Oregon Utah, New Hampshire and Vermont(civil) now have such statutes.
5. Increase from 120 to 180 day suspension for refusal to take a breath test.
6. Count out of state convictions when determining penalty; not only when determining length of suspension.

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DEPARTMENT OF PUBLIC SAFETY
OFFICE OF ALCOHOL TESTING
1155 CENTRAL AVENUE
NEEDHAM, MA 02192

SERUM CONVERSION CHART

You can use this conversion chart if you have a serum alcohol result on a defendant that you want to convert to a blood alcohol level as expressed in G.L. c.90 s 24N. If the result is in expressed in mg/dl look in the left hand column labeled Serum Alcohol Level for your result. The corresponding blood alcohol level for the average individual would be in the corresponding right hand column. This chart gives you the average blood alcohol and does not attempt to give you the possible high and low alcohol levels due to the water content of the defendant's blood.

SERUM ALCOHOL LEVEL	BLOOD ALCOHOL LEVEL
057-067 MG/DL	0.05%
068-078 MG/DL	0.06%
079-090 MG/DL	0.07%
091-101 MG/DL	0.08%
102-112 MG/DL	0.09%
113-124 MG/DL	0.10%
125-135 MG/DL	0.11%
136-147 MG/DL	0.12%
148-158 MG/DL	0.13%
159-169 MG/DL	0.14%
170-181 MG/DL	0.15%

SERUM ALCOHOL LEVEL	BLOOD ALCOHOL LEVEL
182-192 MG/DL	0.16%
193-204 MG/DL	0.17%
205-215 MG/DL	0.18%
216-226 MG/DL	0.19%
227-238 MG/DL	0.20%
239-249 MG/DL	0.21%
250-261 MG/DL	0.22%
262-272 MG/DL	0.23%
273-283 MG/DL	0.24%
284-295 MG/DL	0.25%
296-306 MG/DL	0.26%
307-318 MG/DL	0.27%
319-329 MG/DL	0.28%
330-340 MG/DL	0.29%
341-352 MG/DL	0.30%



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SEPTEMBER 3, 1991

The following individuals are authorized to repair certified breath testing devices and simulators as designees of the Office of Alcohol Testing:

BAC VERIFIER, DATAMASTER INSTRUMENTS

Mann, William W. Jr.
BREATH TESTING SERVICES
4 Bradford Road
Woburn, MA 01801
(617) 932-8982

CMI INSTRUMENTS AND SIMULATORS

Ulrec Serve
CMI/MPH subsidiaries of MPD Inc.
633 Highland Avenue
Needham, MA 02192
(617) 449-1922

INTOXIMETER INSTRUMENTS

Mayo, Barbara
Merrill, Darwin
DMB Sales
83 Winding Brook
South Burlington, VT 05403
(802) 865-1252

Mann, William W. Jr.
BREATH TESTING SERVICES
4 Bradford Road
Woburn, MA 01801
(617) 932-8982

SMITH AND WESSON INSTRUMENTS AND SIMULATORS

Berlo, Raymond
E.B.T.Co.
P. O. Box 84
Boston, MA 02137
(617) 364-1265



The Commonwealth of Massachusetts
Department of State Police
Office of Alcohol Testing
Metro Boston Complex
1155 Central Avenue
Needham, Massachusetts 02192
Telephone (617) 727-7827
APPROVED INFRARED BREATH TESTING INSTRUMENTS
501 CMR 2.38

The following is a list of infrared breath testing devices approved by the Office of Alcohol Testing to be used to conduct evidentiary breath tests in the Commonwealth:

<u>COMPANY</u>	<u>INSTRUMENTS</u>
CMI Inc. a subsidiary of MPD, Inc. 316 East Ninth Street Owensboro , KY 42301 (502)685-6545 (800)942-4011	Intoxilyzer 4011,4011A, 4011 AS, 4011 ASA, 5000
Intoximeter, Inc. 1901 Locust Street St. Louis, MO 61303 (314)241-1158	Intoximeter 3000
National Draeger, Inc. P.O.Box 120 101 Technology Drive Pittsburgh, PA 15320 (412)787-8383	Smith & Wesson Breathalyzer 2000
National Patent Analytical Systems 180 Roberts Street East Hartford, CT 06108 (800)237-6724	BAC Verifier DataMaster II
National Patent Analytical Systems, Inc. 2541 Ashland Road Mansfield, Ohio 44905 (800)800-8143	Datamaster

REV.6/23/92



WILLIAM F. WELD
GOVERNOR

THOMAS C. RAPONE
SECRETARY

CHARLES F. HENDERSON
COLONEL

The Commonwealth of Massachusetts
Department of State Police
Office of Alcohol Testing
Metro Boston Complex
1155 Central Avenue
Needham, Massachusetts 02192
Telephone (617) 727-7827
MARCH 10, 1992

TO WHOM IT MAY CONCERN:

The following chemists are certified as blood alcohol analyst under M.G.L.c.90s.24 1(a),(e),and(f) by the Office of Alcohol Testing:

Elian, Albert -Chemist II/DPS Crime Lab
Hebard, William-Chemist II/DPS Crime Lab
Lumley, Mary Kate-Chemist III/DPS Crime Lab
McKillop, Debra-Chemist II/DPS Crime Lab
O'Brien, Barbara-Chemist II/DPS Crime Lab
Pratt, Dan-Chemist II/DPS Crime Lab
Sloane, John M.-Chemist III/DPS Crime Lab

Nancy J. Burns
Director
Office of Alcohol Testing



The Commonwealth of Massachusetts

Registry of Motor Vehicles

100 Nashua Street, Boston, Mass. 02114

Jerold A. Gnazzo
Register

The Commercial Motor Vehicle Safety Act of 1986 requires that all states have in place by April of 1992, the new federal requirements for licensing and controlling commercially licensed operators. The Federal Act was adopted into Massachusetts Law in Chapter 246 of the Acts of 1990 and created a new chapter of motor vehicle law, which is Chapter 90F. In part, this law created new requirements and enforcement responsibilities in the area of Admin Per Se and Chemical Test Refusal procedures for commercial operators.

The Office of Alcohol Testing and the Registry of Motor Vehicles have been receiving many questions about this new law and its requirements in these two specific areas.

Together, we have formulated the following list of questions and concerns that the police community have been asking, in hopes of receiving legal answers and interpretations to be used in disseminating information to the various enforcement units that will be engaged in enforcing these new requirements.

The questions on which we are seeking legal guidance are as follows:

1. Is it a requirement for a police officer to have a commercially licensed operator under arrest for OUI before he can ask him to submit to a chemical test?
A. No. c. 90F, s. 11.
2. What are the minimum reasonable grounds or test for probable cause necessary to detain a commercial operator and place the operator out-of-service for 24 hours when the officer believes that the operator has alcohol in his system but refuses to submit to a chemical test? Is .04 probable cause?
A. Any detected presence of alcohol is probable cause. c. 90F, s. 11 (B) and 49 CFR 392.5(2).
3. Does a reading of .04 to .05 by a commercial operator cause the Registry to take action on the commercial license only?
A. Yes, a one year disqualification. Must be greater than .05 to trigger c. 90, s. 24 action.
4. Does a reading of .06 to .09 by a commercial operator cause

the Registry to take action on the commercial license only?

A. Registry will disqualify CDL for one year. Police can also proceed per c. 90, s. 24.

5. If a commercial operator is detained or stopped and his chemical test reading is .05, the CDL law requires that he be placed out-of-service for 24 hours but Chapter 90, Section 24 requires him to be released forthwith. What action should the police officer take?

A. Driver put out of service for 24 hours CDL, but can operate non-CDL vehicle. Police can not proceed under c. 90, s. 24, but should send report to Registry for a one year disqualification.

6. If a chemical test results in a reading of .10 or higher can the police officer file both the Commercial Admin Per Se Form with the Registrar and also the standard Admin Per Se, Chapter 90-24N, form with the court? In this case can the police officer arrest and cite the operator for OUI?

A. Yes, both questions.

7. The federal law requires that the individual receive and understand his implied consent rights and possible sanctions. Is this a statement that is acknowledged by the individual? If not, what is required?

A. Affidavit of police officer c. 90F, s. 11(C).

8. If a commercial operator refuses to take the chemical test that is offered to him, does the suspension action apply to his commercial license only or does it also apply to his passenger license?

A. CDL only, unless there is an arrest and offer per c. 90, s. 24 in which case it's both.

9. Is a commercial operator ever placed under arrest? If so, under what circumstances?

A. Yes, if there is probable cause that he/she is OUI per c. 90, s. 24.

10. If, at a commercial stop, a detainee blows 0.15, what should the police officer do?

a. Under the commercial law is the operator detained and placed out of service for 24 hours? Is he arrested and charged with OUI or is the administrative suspension by the Registry the only penalty?

b. If administrative suspension only, is it on Class A, B or C only? Criminal suspension Class D? What are reasonable grounds?

A. Arrest per c. 90, s. 24.
Per se per c. 90, s. 24N.
CDL affidavit per c. 90 F, s. 11 (D).
Out of service per c. 90 F, s. 10.

11. If a commercial operator takes a breath test and the reading is 0.00, the possibility exists that he may be on drugs. Can the police officer ask him to take a second test of either blood or urine under the federal law?

A. Yes, c. 90 F, s. 11 (A).

12. Who can cite a commercial operator? Individual police officers certified annually under Commercial Motor Vehicle Carrier Act? Any certified breath test operator? Any certified police officer?

A. Citations for c. 90F, by any police officer.
Citations for 540 CMR 14 only DOT certified police.

13. The Registry is asking for a copy of test results to be attached to *Prima Facie* certificate on CDL but not C. 90, S. 24(N). Why is this needed?

A. CDL is an administrative process with no pre-suspension hearing. Section 24N has a pre-suspension hearing before a judge.

14. C. 90F s. 1, defines alcohol and alcohol concentration different than C. 90, s. 24 and 501 C.M.R. 2.09. What instructions should be given to the police officers?

A. The 90F definition is broader "any substance and any form of alcohol". If action is taken per c. 90, s. 24 it will always satisfy 90F.

15. Chapter 90F, Section 11A refers to test or tests of blood, breath or urine; C 90 s. 24 refers to test of blood. What instructions should be given to the police officer?

A. Non-CDL is one test for alcohol only, after arrest c. 90, s. 24. CDL is one or more tests for alcohol and/or drugs with only probable cause, no arrest necessary.

16. Chapter 90F, Section 11A allows for the testing for drugs, but does not define any procedures for such test. What are the procedures?

A. We need to find out what other states are doing and feds are

recommending so we can write regulations per c. 90F, s. 14.

17. At a commercial stop, the operator refuses the test for alcohol offered by the police. The operator is placed out-of-service for 24 hours. Can he drive a commercial vehicle after the 24 hour out-of-service period until his license is administratively suspended or is his suspension effective at the time of the refusal? Can he drive a passenger vehicle immediately?

A. After 24 hours, he can operate commercially until the Registrar disqualifies c. 90F, s. 11(E). Has no effect on his non-commercial license privilege.

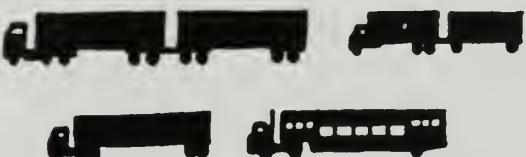
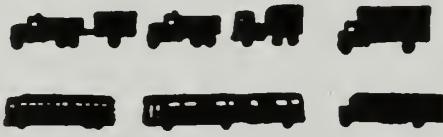
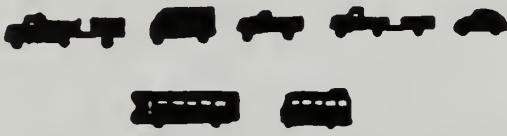
18. What is the intent of Chapter 90F, Section 10?

A. Self explanatory. If the officer detects presence of alcohol, the operator should be given a 24 hour out-of-service order.

19. If a commercial operator is operating a commercial vehicle for personal use only and he is stopped and cited for OUI is this a commercial violation and suspension or a non-commercial violation and suspension?

A. If a CDL is required for operation of the vehicle on the ways of the Commonwealth, it becomes a commercial violation, at least, and could be both.

MASSACHUSETTS COMMERCIAL DRIVERS LICENSE CLASSIFICATION

With this Class License	YOU MAY DRIVE	RELATED ENDORSEMENTS
A	<p>Any combination of vehicles with a GVWR of 26,001 or more pounds provided the GVWR of the vehicle(s) being towed is in excess of 10,000 pounds. (Holders of a Class A License may, with any appropriate endorsements, operate all vehicles within Classes B and C.)</p> <p>Examples include, but are not limited to:</p> 	<p>Double/Triple Trailers Tank Vehicles Tank Vehicles with HAZMAT HAZMAT Passenger Transport Vehicles</p>
B	<p>Any single vehicle with a GVWR of 26,001 or more pounds, or any such vehicle towing a vehicle not in excess of 10,000 pounds GVWR. (Holders of a Class B License may, with any appropriate endorsements, operate all vehicles within Classes B and C.)</p> <p>Examples include, but are not limited to:</p> 	<p>Double/Triple Trailers Tank Vehicles Tank Vehicles with HAZMAT HAZMAT Passenger Transport Vehicles</p>
C	<p>Any single vehicle that is less than 26,001 pounds GVWR, or any such vehicle towing a vehicle not in excess of 10,000 pounds GVWR, that is placarded for hazardous materials or designed to transport 16 or more persons, including the operator.</p> <p>Examples include, but are not limited to:</p> 	<p>Tank Vehicles Tank Vehicles with HAZMAT HAZMAT Passenger Transport Vehicles</p>

The vehicle in which you will take the road skills test must meet the written description for that class. If you wish to be licensed to drive a vehicle with air brakes, the vehicle in which you will be tested must be equipped with air brakes. The above vehicle silhouettes typify, but do not fully cover, the types of vehicles falling within each class. To operate a school bus, drivers are required to obtain a specific certification, in addition to the appropriate class and endorsement of CDL license.

STATUTORY RIGHTS AND CONSENT FORM

CASE NO: _____

DATE: _____

COMM v. _____

TIME: _____

RIGHTS TO A DOCTOR

GENERAL LAWS, CHAPTER 263, Section 5A, as ammended: A person held in custody at a police station or other place of detention, charged with operationg a motor vehicle while under the influence of intoxicationg liquor shall have the right, at his request and at his expense, to be examined by a physician selected by him. The police official or designee in charge of such station or place of detention, or his designee, shall inform him of such right immediately upon being booked, and shall afford him a reasonable opportunity to exercise it.

RIGHTS TO A TELEPHONE

CHAPTER 276, SECTION 33A as ammended: The police official in charge of the station or other place of detention having a telephone wherin a person is held in custody, shall permit the use of the telephone at the expense of the arrested person, for the purpose of allowing the arrested person to communicate with his family or friends, or arrange for release on bail, or engage the services of an attorney. Any such person shall be informed forthwith upon his arrival at such station or place of detention, of his right to use the telephone, and such use shall be permitted within one hour therafter.

OPPORTUNITY TO SUBMIT TO A CHEMICAL TEST

CHAPTER 90, SECTION 24 as ammended: I am going to offer you the opportunity to submit to a chemical test to determine your blood alcohol concentration. If you refuse this test, your license or right to operate in the Commonwealth of Massachusetts will be suspended by the Registrar of Motor Vehicles for a period of 120 days. If you decide to take the test and complete the test, the test results will be made available to you upon your request. Upon completion of this test, you have the right to a comparison blood test within a reasonable period of time at your own expense. The results of this comparison test can be used to restore your license or right to operate at a court hearing. Such a hearing request must be made within ten days.

DO YOU CONSENT TO SUBMIT TO A CHEMICAL TEST (BREATH/BLOOD) TO DETERMINE YOUR BLOOD ALCOHOL CONCENTRATION? YES NO

SUBJECT: _____

WITNESSED BY : _____
Police offical or designee in charge of station